NO. 92751-1

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER,

v.

JOSHUA JAMES MULLENS, RESPONDENT

Court of Appeals Cause No. 47290-2-II
Appeal from the Superior Court of Pierce County
The Honorable Stanley Rumbaugh, Judge

No. 14-1-04317-3

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

State of Washington, respondent in the Court of Appeals.

B. COURT OF APPEALS DECISION.

The petitioner seeks review of ***State v. Mullens***, 2015 WL 7571757 (No. 47290-2-II, November 24, 2015). The Court of Appeals filed an unpublished opinion on the matter.

C. ISSUE PRESENTED FOR REVIEW.

1. Should this Court accept review of a decision that requires the inclusion of a definitional term in the charging document even though this is contrary to this Court's holding in ***State v. Johnson***[1]?

D. STATEMENT OF THE CASE.

On October 30, 2014, the Pierce County Prosecutor's office (State) charged Joshua James Mullens (defendant) by information with one count of unlawful possession of a stolen vehicle, Pierce County cause No. 14-1-04317-3. CP 1. The information read:

[1] ***State v. Johnson***, 180 Wn.2d 295, 325 P.3d 135 (2014).

> I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse JOSHUA JAMES MULLENS of the crime of UNLAWFUL POSSESSION OF A STOLEN VEHICLE, committed as follows:
>
> That JOSHUA JAMES MULLENS, in the state of Washington, on or about the 29th day of October, 2014, did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.

CP. 1.

Defendant did not challenge the sufficiency of the charging document nor put on a case at trial. 2/17/15 RP 113. On February 18, 2015, a jury found the defendant guilty as charged. CP 49. He was sentenced on February 27, 2015, to a standard range sentence of 57 months total confinement. CP 57-68.

Defendant appealed to the Washington Court of Appeals, Division II. CP 74. Based on its earlier decision in ***State v. Satterthwaite***, 186 Wn. App. 359, 344 P.3d 738 (2015), the court reversed defendant's conviction and dismissed the charge for unlawful possession of a stolen motor vehicle without prejudice finding the charging language was defective. ***Mullens***, at *2.

The State now petitions this Court for review of that decision. This Court should note that the State has also filed a petition for review on the same issue in ***State v. Porter***, 188 Wn. App. 1051 (2015) WL 4252605.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH A DECISION OF THIS COURT, THERE IS A POTENTIAL DISAGREEMENT BETWEEN TWO DIVISIONS OF THE COURT OF APPEALS, AND THE PUBLIC AND LOWER COURTS HAVE A SUBSTANTIAL INTEREST IN CLARIFYING THE LAW RELATING TO AUTO THEFT AND POSSESSION OF STOLEN PROPERTY.

RAP 13.4(b) sets forth considerations governing the acceptance of discretionary review:

> A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

a. Division II's decision in ***Mullens*** conflicts with this Court's decision in ***Johnson*** that the elements of crimes need not be defined in the information. This Court should accept review to address this conflict.

An information is constitutionally sufficient if it includes all essential elements of a crime. ***State v. Vangerpen***, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). An "essential element" is an element whose specification is necessary to establish the very illegality of the act charged. ***State v. Zillyette***, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). Requiring all statutory and non-statutory elements in the charging document provides the accused of fair notice of the charges against him to afford him the opportunity to prepare a defense. ***Vangerpen***, 125 Wn.2d at 787.

Although essential elements are required to make an information constitutionally sufficient, the State need not include definitions of the elements. ***State v. Johnson***, 180 Wn.2d 295, 302, 325 P.3d 135 (2014). In ***Johnson***, defendant was convicted of unlawful imprisonment, among other things. The charging language read, "did knowingly restrain [J.J.], a human being." *Id.* at 301. This language was based upon criminal code RCW 9A.40.040 and tracks the language therein which reads, "[A] person is guilty of unlawful imprisonment if he or she knowingly restrains another person." RCW 9A.40.040(1). Johnson challenged the information because it did not define "restrain," a term defined in RCW 9A.40.010 as

"to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty." RCW 9A.40.010(6). Defendant argued this was an essential element. The Court rejected this argument, reaffirming that definitions of elements do not need to be included in the information to make it constitutionally sufficient. *Id.* at 302.

In ***Satterthwaite***, defendant was convicted of possession of a stolen vehicle. The charging language in that case stated defendant "committed 'possession of a stolen motor vehicle' because she 'did knowingly possess a stolen vehicle.'" ***Satterthwaite***, 186 Wn. App. at 365. Although the charging language tracked the language of the statute, —"A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle." RCW 9A.56.068(1)—Division II held the charging document was insufficient because it found the definition of "possess" to be an essential element of the charge. *Id.* at 365.

The present case presents an issue similar to that addressed in ***Johnson*** in that the charging language mirrors the definitional structure of the statute. The charging language in this case alleged defendant "did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing it had been stolen." CP 1. This language is derived from and tracks RCW 9A.56.068 which reads, "[A] person is guilty of possession of

a stolen vehicle if he or she possess [possesses] a stolen motor vehicle." RCW 9A.56.068(1). "Possess" is defined in RCW 9A.56.140 to mean "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). ***Satterthwaite*** requires that the information define "possess" as requiring that a defendant "withhold or appropriate [possessed stolen property] to the use of any person other than the true owner or person entitled thereto." 186 Wn. App. 359, 362, 344 P.3d 738 (quoting RCW 9A.56.140(1)) (alteration in original). Requiring the definition of an essential element is contrary to this Court's holding in ***Johnson*** that no such definition is required. This Court should accept review to address this conflict.

b. Division III recognized the tension between Division II's holding in ***Satterthwaite*** and this Court's precedent in ***Johnson***. This Court should accept review to address this potential disagreement between the divisions.

In a Division III case, a defendant raised a supplemental assignment of error relying on ***Satterthwaite***, requesting the court find the information constitutionally deficient. ***State v. Torres***, 2015 WL 1609113 (No. 31616-5-III, Apr. 9, 2015). In that case, defendant was convicted of possession of a stolen motor vehicle. The court, however, declined to reach the merits of

that assignment of error because the defendant raised it months after the filing of the original briefing. *Id.* at *5. In declining to find the defendant's counsel was ineffective for failing to anticipate the new rule announced in ***Satterthwaite***, the court said: "The new rule is not obvious. Although we decline to agree or disagree with the new rule, *we recognize the tension* with, and the *effort* Division Two made to distinguish, ***State v. Johnson***, 180 Wn.2d 295, 325 P.3d 135 (2014)." ***Torres***, at *5 (emphasis added).

Although Division III did not adopt or reject ***Satterthwaite***, the court's statement that the new rule is "not obvious" and its recognition of the tension between ***Satterthwaite*** and ***Johnson*** indicates Division III's reluctance to accept the new rule ***Satterthwaite*** created. This Court should accept review of ***Mullens*** to address this potential disagreement between Division II and Division III regarding what ***Johnson*** means regarding possession of stolen vehicles.

c. <u>This Court should accept review because auto theft—and possession of stolen property—is a recognized problem in Washington State, and it is in the interest of the public and the trial courts to have the law clarified.</u>

Motor vehicle theft is an issue of substantial public interest in Washington. The legislative history for RCW 9A.56.068 recognizes the substantial interest Washingtonians have in auto theft crimes. According to the report, Washington ranks fourth per capita in the nation for auto

theft crimes. H.B. Rep. 1001, 56th Reg. Sess. (Wash. 2007). The Washington Auto Theft Prevention Authority reported 28,068 auto thefts in Washington in 2014 alone. WASHINGTON AUTO THEFT PREVENTION AUTHORITY, *2014 Actual Stolen by County Worksheet*, (available at https://watpa.waspc.org/images/WACIC%202014%20FINAL%20STATS.pdf).

Further, the "withhold or appropriate" language ***Sattherthwaite*** now requires for charging documents alleging unlawful possession of a stolen vehicle applies to cases far beyond that crime alone. The definition relied upon comes from RCW 9A.56.140(1), which applies to all possession of stolen property crimes. "'Possessing stolen property' means knowingly to receive, retain, possess, conceal, or dispose of *stolen property* knowing that it has been stolen and to *withhold or appropriate* the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1) (emphasis added). It is unclear whether ***Satterthwaite***'s newly required element will also apply to all other possession of stolen property crimes that rely on this "withhold or appropriate" language. Such an application would significantly impact the criminal justice system.

Auto theft, and the subsequent unlawful possession of those stolen vehicles, is a crime of high occurrence in Washington. The public and the trial courts have a substantial interest in insuring the charging documents

for these crimes—and all other possession of stolen property crimes—are constitutionally sufficient across the State. This Court should accept review to clarify the language required in informations alleging unlawful possession of a stolen vehicle.

F. CONCLUSION.

The State respectfully requests this Court accept review of Division II's decision in ***State v. Mullens*** because it conflicts with this Court's decision in ***Johnson***, there is potential disagreement between Division II and Division III of the Court of Appeals, and Washingtonians and Washington courts have a substantial interest in the law of auto theft given its high occurrence.

DATED: December 23, 2015.

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Prosecuting Attorney

KATHLEEN PROCTOR
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Stacy Norton
Legal Intern

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~US~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12-23-[illegible]
Date Signature

PIERCE COUNTY PROSECUTOR

December 23, 2015 - 10:46 AM

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